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Case Number 253,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRANDON WYCHE,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	**No. 253, 2014**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND FOR

NEW CASTLE COUNTY

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DATE: October 13, 2014

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NATURE AND STAGE OF THE PROCEEDINGS

Brandon Wyche ("Wyche") was charged with murder first degree, possession of a firearm during commission of a felony ("PFDCF"), and possession of a deadly weapon by a person prohibited ("PDWBPP"). The PDWBPP charge was *nolle prossed*. (A-1).

Wyche went to trial on June 10, 2013. The jury was hung and the court declared a mistrial. (D.I. #87; A-11). Wyche's subsequent trial commenced on February 17, 2014. Prior to trial, defense counsel filed a motion in limine to exclude the 11 *Del.C.* § 3507 statement of Carlyle Brathwaite, one of the State's primary witnesses. (D.I. #110; A-14). The motion was denied before trial and again after it was renewed prior to Brathwaite taking the stand. (A-48).

Wyche was found guilty on both counts. (A-1). He was sentenced on April 25, 2014 to life in prison.[1] Wyche filed a timely appeal. This is his Opening Brief as to why his convictions must be reversed.

[1] *See* Sentence Order attached as Ex. B.

SUMMARY OF THE ARGUMENT

1. The trial court committed reversible error when it permitted the state to present to the jury, under 11 *Del.C.* § 3507, its key witnesses' out-of-court statement. The witnesses' incriminating statement implicating Wyche as the shooter was involuntary and procured by the Detective who failed to read him his *Miranda* rights.

STATEMENT OF THE FACTS

On March 12, 2011, Officer Brian Burke of the New Castle County Police Department was sent to interview Brandon Wyche at the hospital, who had miraculously survived being shot in the head by Benny Merrell ("BJ") during a robbery. (A-21). Wyche was hanging out with Kynesha Daniels at the Wellington Woods Park in Bear, Delaware, when Merrell asked him if he had any marijuana. When Wyche responded that he didn't know, Merrell pulled out a revolver and shot Wyche in the head. (A-25-26). After Wyche lay unconscious on the ground, Merrell "ran his pockets" and took $200. (A-22). Although Daniels recognized Merrell as the assailant, she did not report the incident to police and Merrell was never arrested for his role in the attempted murder and robbery of Wyche. (A-26).

On August 30, 2012, New Castle County police responded to reports of a shooting at the Wilton Parkland in New Castle, Delaware. (A-18). Officer Gina Collini testified that she arrived on the scene and first made contact with Michelle Newkirk. (A-19). Michelle identified the victim of the shooting as her boyfriend, Merrell, and provided police with a physical description of the shooter. (A-19). She told the officers that the shooter's first name was Brandon. (A-21). Sergeant Burke, the second officer on scene, asked Michelle if she was referring to Brandon Wyche. (A-21).

Michelle replied that she did not know Brandon's last name. However, she later testified that Merrell admitted to shooting Wyche in March 2011. (A-27-28).

At trial, Michael Newkirk, Michelle's twin brother, testified that he was at Wilton Parkland with Carlyle Brathwaite the night Merrell was shot. (A-34-35). In his initial interview with police, Newkirk gave a false name and denied having any information about the shooting. (A-36-37). Newkirk gave conflicting testimony at trial. He testified that Merrell was playing basketball when Wyche and another male, known as Kick, arrived to the Parkland in a white Lexus. (A-35). According to Newkirk, both subjects exited the vehicle and approached the area on foot. (A-36). Moments later, the assailant allegedly displayed a handgun and fired two shots at Merrell. (A-36). Merrell died as a result of a gunshot wound to the chest. (A-39). The police never recovered the weapon or any shell casings. Wyche's clothing was tested for gunshot residue, however the tests were inconclusive. (A-38). Wyche was apprehended by police shortly after the shooting. (A-23-24).

During the investigation in this case, Detective Rogers interviewed Carlyle Brathwaite after he was arrested for an unrelated matter and had not yet been arraigned or had his bail set. (A-45-46). Brathwaite was only 17

years old at the time and advised Detective Rogers that his mother was out of the country. (A-46). Thus, no parental guardian or adult was present with Brathwaite at the time of his interrogation. At no time did Detective Rogers advise Brathwaite of his *Miranda* rights prior to or during the custodial interrogation. (A-46). Brathwaite's out-of-court statement implicated Wyche as having shot Merrell on August 30, 2012. (A44). Brathwaite's videotaped statement was played for the jury pursuant to 11 *Del. C.* § 3507. (A-48-49).

As part of the investigation, police also interviewed Jennine Hines, who gave a statement that she witnessed the shooting at Wilton Parkland on August 30, 2012 and saw the gunman. In light of her statement, Hines was shown a photo lineup that included Wyche in order to identify the alleged shooter. Hines selected Levar Watson from the photo lineup and was adamant that he was the gunman. (A-30-31). Watson told police that he was home with his girlfriend on the night of the shooting. However, police never followed up to check the veracity of his alibi and he was not brought in for any further questioning. (A-32). Police also took statements from Nadia Hoyt and Angelina Brown, two witnesses who lived near the area where the shooting took place. (A-52). On August 30, 2012, both Hoyt and Brown heard gunshots and then saw two African American male subjects,

one short and fat and the other tall and skinny, running eastbound from Wilton Parkland. The short and stocky subject possessed a handgun and placed it in a yellow backpack before continuing to run from the area. (A-50).

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT PERMITTED THE STATE TO PRESENT TO THE JURY, UNDER 11 *DEL.C.* § 3507, BRATHWAITE'S OUT-OF-COURT STATEMENT THAT WAS INVOLUNTARY AND COERCED BY THE INTERROGATING DETECTIVE WHO FAILED TO READ HIM *MIRANDA* RIGHTS.

Question Presented

Whether Brathwaite's out-of-court statement implicating Wyche was admissible under 11 *Del.C.* § 3507 when it was not voluntarily given and the interrogating Detective failed to read him *Miranda* rights? (A-48).

Standard and Scope of Review

This Court "review[s] a trial judge's decision on the admissibility of a 3507 statement for abuse of discretion." *Flonnory v. State*, 893 A.2d 507, 515 (Del. 2006). A trial judge's determination of voluntariness is reviewed under an abuse of discretion standard. *Turner v. State*, 5 A.3d 612, 615-13 (Del. 2010).

Argument

The trial court erroneously permitted the State to introduce, under 11 *Del.C.* § 3507, Carlyle Brathwaite's out-of-court statement despite the fact that it was obtained without advising the witness of his *Miranda* right, thus rendering it involuntary. This statement was used as affirmative evidence to establish that Wyche shot Merrell.

Detective Rogers interviewed Brathwaite following his arrest for an unrelated matter and had not yet been arraigned or had his bail set. (A-45-46). Brathwaite was a minor, only 17 years old, at the time of the interrogation and expressed to Detective Rogers that his mother was out of the country. (A-46). Thus, no parental guardian or adult was present with Brathwaite at the time of his interrogation. (A-46). More shockingly, Detective Rogers candidly admitted that he never advised Brathwaite of his *Miranda* rights prior to or during the custodial interrogation. (A-46). Yet, the trial court denied Wyche's motion in limine and overruled his renewed objection to the statement's introduction before Brathwaite testified.[2] (A-48). Since the requirements for admission under section 3507 were not met, Wyche's convictions must be reversed.

Because custodial interrogations are inherently coercive, any statement by a witness in custody is presumptively involuntary in the absence of certain procedural safeguards. This venerated principle of law was established by the United States Supreme Court in *Miranda*[3] in cases involving the custodial interrogations of suspects who are actually under

[2] The Court, in Wyche's first trial, never made a ruling as to whether the statement was voluntary so the voluntariness issue is not precluded by the Law of the Case Doctrine. Even should the Court believe the doctrine applies, the doctrine is flexible and, unlike res judicata, it will not be enforced where doing so would produce an injustice. *Brittingham v. State*, 705 A.2d 577, 579 (Del. 1998).

[3] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

arrest. In those situations, unless the procedural safeguards established by *Miranda* are adhered to, any statement by the accused cannot be admitted into evidence.

The principles and rationale for the holding in *Miranda* were reaffirmed by the United States Supreme Court in *J.D.B. v. North* Carolina.[4] As the High Court expressed:

> By its very nature, custodial police interrogation entails "inherently compelling pressures." Even for an adult, the physical and psychological isolation of custodial interrogation can "undermine the individual's will to resist and ... compel him to speak where he would not otherwise do so freely."…Recognizing that the inherently coercive nature of custodial interrogation "blurs the line between voluntary and involuntary statements," this Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination. Prior to questioning, a suspect "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." And, if a suspect makes a statement during custodial interrogation, the burden is on the Government to show, as a "prerequisit[e]" to the statement's admissibility as evidence in the Government's case in chief, that the defendant "voluntarily, knowingly and intelligently" waived his rights. *Id.*

[4] *J.D.B. v. North Carolina,* —– U.S. ——–, 131 S.Ct. 2394, 2401, 180 L.Ed.2d 310 (2011) (internal citations omitted).

For those same reasons, this Court in *Taylor* held that *Miranda's* procedural safeguards also apply to the interrogation of a witness who is in custody. *Taylor v. State*, 23 A. 3d 851, 855 (Del. 2011). In *Taylor*, this Court held that statements obtained through custodial interrogation absent the procedural safeguards recognized in *Miranda v. Arizona* are presumptively involuntary and thus inadmissible.[5] The Court reasoned:

> Absent uniform treatment for the custodial interrogation of both a defendant who is actually under arrest and a witness who believes he is under arrest, the evidentiary results are unfairly and inexplicably inconsistent. The defendant's self-incriminating statement would be inadmissible, yet the §3507 statement of a witness that incriminates a third-party would be admitted into evidence. That is not how the rule of law should or does operate under our constitutional democracy. In both situations, the custodial interrogations are inherently coercive and both types of statements are inadmissible if the procedural safeguards of *Miranda* are not followed. That must be so, since the concerns that animate *Miranda* are identical in both cases.[6]

To determine whether an out-of-court statement is voluntary, the Court must consider whether, "under the totality of the circumstances, the witness' statements were the product of a rational mind and free will." *Martin v. State*, 433 A.2d 1025, 1032 (Del.1981)). To do so, the Court should focus on: "the behavior of the interrogators, as well as the

[5] *Id.* at 854-855, *citing Miranda v. Arizona*, 384 U.S. 436, 444 (1966).
[6] *Id.* at 856.

mental/physical makeup of the individual being interrogated, to determine whether the individual's will was so overborne that the statements produced were not the product of a rational intellect and free will." *Id*. A statement is involuntary if "the totality of the circumstances demonstrate that the witness's will was overborne." *Taylor*, 23 A.3d 851 at 853. See also, *Baynard v. State*, 518 A.2d 682, 690 (Del. 1986). The State bears the burden of proving voluntariness by a preponderance of the evidence. *Roth v. State*, 788 A.2d 101, 107-108 (Del. 2001).

Here, the record reflects that Carlyle Brathwaite's out-of-court statement was not voluntary. At the time Brathwaite gave his statement, he was in police custody having been arrested for an unrelated matter and had not yet been arraigned or had his bail set. (A-45-46). Exacerbating the "inherently compelling pressures" was the fact that Brathwaite was only 17 years old and no parent, parental guardian or adult was present with him during the interrogation. (A-46). He was clearly vulnerable and at the mercy of Detective Rogers. Even more fatal to the trial court's ruling is Rogers' candid admission that at no time during the interrogation did he advise Brathwaite of his *Miranda* rights. (A-46). Under this Court's well reasoned decision in *Taylor*, this glaring omission alone is sufficient to render the out-of-court statement presumptively involuntary and thus

inadmissible pursuant to 11 *Del. C.* §3507(a). *Taylor*, 23 A.3d 851 at 854-855.

The erroneous admission of Brathwaite's out-of-court statement implicating Wyche as the shooter was not harmless beyond a reasonable doubt. The State had no physical evidence or confession linking Wyche to the shooting. The testimony of the other witnesses was hardly conclusive. Newkirk, one of the alleged eyewitnesses, initially lied to police and stated that he didn't see the shooting. (A-37). Hoyt and Brown testified seeing a short rotund male subject possessing a handgun shortly after the shooting. (A-50). A physical description that does not match that of Wyche. Moreover, Jennine Hines, who testified that she witnessed the shooting at Wilton Parkland on August 30, 2012 and saw the gunman from close range, did not identify Wyche as the shooter in a photo lineup and instead was adamant that Levar Watson was the gunman. (A-30-31).

Even the State admitted that Brathwaite was "a very important witness" and "one-third of the State's eyewitnesses in this case". (A-17(a)). Thus, the statement played a significant role in Wyche's convictions. Therefore, this Court must reverse his convictions.

CONCLUSION

For the reasons and upon the authorities cited herein, the undersigned counsel respectfully submits that Brandon Wyche's convictions and sentences must be reversed.

Respectfully submitted,

/s/ Santino Ceccotti_____
Santino Ceccotti, Esquire

DATED: October 13, 2014